

CITY OF BELLEVUE
CITY COUNCIL

Summary Minutes of Regular Session

November 2, 2009
8:00 p.m.

Council Chamber
Bellevue, Washington

PRESENT: Mayor Degginger, Deputy Mayor Balducci, and Councilmembers Bonincontri, Chelminiak, Creighton, Davidson, and Lee

ABSENT: None.

1. Call to Order

The meeting was called to order at 8:04 p.m., with Mayor Degginger presiding.

2. Roll Call, Flag Salute

Upon roll call, all Councilmembers were present. Councilmember Bonincontri led the flag salute.

3. Communications: Written and Oral: None.

Mayor Degginger explained that the Council cannot take public comment regarding the proposed helistop [Agenda Item 9] because it is a quasi-judicial matter in which the Council must base its decision on the record presented to the Hearing Examiner. Councilmembers also cannot discuss the pending application or appeal with anyone if contacted directly.

No one came forward to speak.

4. Reports of Community Council, Boards and Commissions: None.

5. Report of the City Manager: None.

6. Council Business and New Initiatives

[Council business was reported during the earlier Study Session.]

Mayor Degginger noted that three Councilmembers will be absent from the November 9 meeting. He suggested rescheduling the meeting to November 30.

- Deputy Mayor Balducci moved to cancel the November 9 meeting and to reschedule the Extended Study Session to November 30. Councilmember Lee seconded the motion.
- The motion to reschedule the November 9 meeting to November 30 carried by a vote of 7-0.

7. Approval of the Agenda

- Deputy Mayor Balducci moved to approve the agenda, and Councilmember Chelminiak seconded the motion.
- The motion to approve the agenda carried by a vote of 7-0.

8. Consent Calendar

Deputy Mayor Balducci noted a revision requested by Councilmember Lee to the October 19 Study Session minutes, which is outlined in a memo in the desk packet.

Ms. Balducci said she would like to submit some revisions to the October 12 Extended Study Session minutes and the October 19 Study Session minutes. She asked Council to postpone action on these sets of minutes.

- Deputy Mayor Balducci moved to approve the Consent Calendar, with the exception of the October 12 Extended Study Session and October 19 Study Session meeting minutes. Councilmember Chelminiak seconded the motion.

Councilmember Lee stated a clarification to the February 5-7, 2009 Council Retreat minutes. Referring to the last page of the minutes, Mr. Lee said he did not question the Council's interest in placing more emphasis on immigrant populations and community mental health services, but instead he emphasized the need to do so.

Councilmember Davidson noted a misspelling of his name on page 7 of the February 5-7, 2009 Retreat Minutes.

- The motion to approve the Consent Calendar, as amended, carried by a vote of 7-0, and the following items were approved:
 - (a) Minutes of February 5-7, 2009 Retreat [As amended]
Minutes of October 19, 2009 Regular Session
 - (b) Motion to approve payment of claims for the period October 17, 2009 through October 30, 2009 and payroll for the period October 1, 2009 through October 15, 2009.

- (c) Ordinance No. 5914: 1) adopting the recommendations for the use of 2010 Community Development Block Grant (CDBG) funds as transmitted by the Human Services Commission; 2) authorizing the submittal of a proposal to the United States Department of Housing and Urban Development (HUD) for the 2010 CDBG Program; 3) authorizing the acceptance of a grant award contract with HUD; 4) creating a new project series within the Operating Grants and Donations Fund; 5) amending the budget for the Operating Grants and Donations Fund by appropriating additional revenues to that Fund; and 6) authorizing entering into contracts with grant subrecipients.
- (d) Resolution No. 7998 authorizing execution of a professional services agreement with Plantscapes, in an amount not to exceed \$23,913.70, for site preparation and installation of street trees, as part of the Forest Drive SE natural area restoration and enhancement project, for a total project cost not to exceed \$66,982.81.
- (e) Resolution No. 7999 authorizing execution of a professional services agreement with Olson Sundberg Kundig Allen Architects (OSKA), in an amount not to exceed \$996,557, for architectural, engineering and site design services for the Bellevue Botanical Garden Visitor Center.
- (f) Resolution No. 8000 authorizing execution of a professional services agreement with Murray, Smith & Associates, in an amount not to exceed \$205,000, for preliminary engineering design for the Sewer Lake Line Replacement Project at Meydenbauer Beach Park (CIP Plan No. S-58).
- (g) Ordinance No. 5915 authorizing: 1) amendment of the 2009-2010 Utility CIP Plan to increase the appropriation by \$905,318 to reflect receipt of King County Flood Capital District reimbursement for flood control projects from the Flood Control District's Subregional Opportunity Fund; and 2) amendment of the 2009-2015 CIP Plan to increase the project budget for the Flood Control Program by \$905,318 (CIP Plan No. D-94).

Action postponed:

- (a) Minutes of October 12, 2009 Extended Study Session
Minutes of October 19, 2009 Study Session

9. Public Hearings

- (a) Limited Public Hearing on the Hearing Examiner's July 20, 2009, Decision concerning the application of Kemper Development Company for a Conditional Use Permit (CUP) to prepare and activate a private use Helistop located on top of the Bank of America Building at 10500 NE 8th Street. File No. 08-35262-LB.

City Attorney Lori Riordan introduced the Limited Public Hearing on the appeals filed by Su Development and Ina Tateuchi et al, on the decision of the Hearing Examiner to approve the application of Kemper Development Company for a Conditional Use Permit for a helistop. The site is located on the roof of the Bellevue Place Bank of America building at 10500 NE 8th Street in the Downtown Office-2 zoning district. The Limited Public Appeal Hearing is confined to the issues decided by the Hearing Examiner after taking testimony at hearings conducted on June 10 and June 11, 2009, regarding the Conditional Use Permit. The appellents are Su Development and Ina Tateuchi et al. The respondents are the applicant, Kemper Development Company, and the City's Director of the Development Services Department.

Ms. Riordan explained that the parties were allowed to submit additional briefs and written comments relating to the appeal by 1:00 p.m. last Wednesday. Materials submitted were reviewed by the City Attorney's Office to ensure compliance with the Council's rules, and any information not contained in the Hearing Examiner's record has been redacted. These written submittals were printed on yellow paper and provided to the Council with the meeting packets delivered on Friday, October 30. Ms. Riordan noted that exhibits to one of the briefs were inadvertently copied and distributed. However, they contain information outside of the record and should not be considered by the Council.

Responding to the City Attorney, Mayor Degginger invited each Councilmember to disclose any ex parte contacts related to this matter. Ms. Riordan said disclosures should include the names of the persons with whom the communication occurred, whether the communication was written or oral, and the substance of the communication. She noted that the City Clerk has identified all of the emails sent to the Council's email account with the City. Councilmembers should, however, disclose any contacts not disclosed by the Clerk, including any individual email accounts or other written sources and/or personal contacts. The appeal parties will be allowed to rebut the substance of any of the ex parte communications during their argument after the hearing has been opened.

Councilmember Chelminiak reported that a couple of emails were sent to his personal email account early in the hearing process asking about the helistop application. Similarly, he noted a number of instances in which residents inquired in person about the status of the matter. In these situations, he explained the quasi-judicial process to the other parties. Mr. Chelminiak noted his list of ex parte contacts, which has been submitted to the City Clerk. He recalled a conversation with Deputy Mayor Balducci before a Council meeting in which both agreed that the public needed to be briefed about the quasi-judicial process. Additional contacts occurred at the luncheon for the Indian Ambassador and at the bus stop.

Mr. Chelminiak disclosed his working relationship with Mr. Dearborn as chief of staff for the Snohomish County Council. Mr. Dearborn represented the County Council, and Mr. Chelminiak was responsible for managing that contract. Mr. Dearborn also briefly provided legal representation to Mr. Chelminiak's mother-in-law relating to a condo issue.

Mr. Chelminiak referenced Exhibit 22, Page 3, which provides sound readings taken at Vineyard Crest and Belfair Lane. He noted for the record that the location used for the readings is within approximately 300 feet of his property line.

Councilmember Creighton said he has nothing additional to disclose beyond the emails submitted to the Council as a whole

Deputy Mayor Balducci disclosed a list of emails sent to her individual City email account. She did not review the substance of each email, but noted they were generally opposed to the helistop facility.

- Email received February 12 from Jerry Jensen.
- Email received February 17 from Ina Tateuchi.
- Email received February 18 from Lynn Hurdlebrink. Ms. Balducci replied to the email to explain the quasi-judicial nature of the matter.
- On February 22, Ms. Balducci sent the same email explanation to Ina Tateuchi. There were additional emails about how Ms. Tateuchi's comments could become part of the official record, which were forwarded to the City's Land Use Director Carol Helland and Senior Planner Carol Saari. Ms. Hurdlebrink's comments were forwarded as well.
- Email received from Phyllis Lindsey in opposition to helistop.
- Email received April 18 from Ms. Tateuchi, at which point Deputy Mayor Balducci did not respond.
- Email received from Jan Stout, which Ms. Balducci has not read.
- Email received October 26 from Alaric Bien opposed to helistop.

In addition, Deputy Mayor Balducci said she had a conversation after the Lake Hills Neighborhood Association Candidate Forum in September with one of the candidates, Betina Finley; John Issacson, Ms. Finley's campaign manager; and Jim Harja, Ms. Balducci's husband. The group discussed the general issue of helistops and whether they should be in the city. Nobody took a strong position, and Ms. Balducci removed herself from the conversation as quickly as possible.

Deputy Mayor Balducci confirmed the conversation reported by Councilmember Chelminiak regarding their interest in seeking clarification about the quasi-judicial process for the public.

Councilmember Davidson said he did not recall any ex parte contacts beyond emails sent to the entire Council.

Councilmember Bonincontri reviewed a list of emails she received through her individual City email account, which were generally opposed to the helistop permit application:

- Email dated February 12 from Jerry Jensen.
- Email dated February 17 from Ina Tateuchi.
- Email dated February 18 from Lynn Hurdlebrink.
- Email dated February 25 from Phyllis Lindsey.
- Email dated October 26 from Alaric Bien.

Ms. Bonincontri reported that a resident she encountered during her campaign inquired about the helistop issue. She explained to him that she could not discuss the matter.

Ms. Bonincontri recalled a meeting during her campaign in late June or early July with John Su, who disclosed his involvement with the Bellevue Downtown Association and his opposition to the helistop application. There was no discussion of the topic beyond his comments, however.

Councilmember Lee disclosed the following list of ex parte communications:

- Email dated February 12 from Jerry Jensen.
- Email dated February 25 from Phyllis Lindsey.
- Email dated March 3 from Michael Obino regarding a breakfast meeting with a group of citizens. One of the 11 agenda items was the helipad. Councilmember Lee attended the meeting, but he did not recall the substance of that discussion.
- In July or August Councilmember Lee met with Mr. Su, a personal friend, regarding Mr. Lee's campaign. They did not discuss the helipad issue.

Mayor Degginger said he has disclosed his ex parte contacts to City staff, who have passed them on to the parties in the appeal. He has had no further communications on the matter. Mr. Degginger explained that the Council anticipated that the helistop application could become an appeal matter before them, and they therefore were reluctant to respond to citizens on the topic. He apologized and assured citizens that the Council welcomes communications from the public on topics that are not quasi-judicial matters.

Ms. Riordan reported that the parties to the appeal have raised three procedural issues in the form of motions, which will need to be decided before tonight's hearing. The first motion requests that the Su Appeal be dismissed on the basis of untimeliness. The second motion requests that the Supplemental Appeal filed by Su Development, received by the Council on October 27, be dismissed on the basis of untimeliness. And the third motion asks that portions of the Tateuchi Appeal be dismissed due to the failure to raise the absence of the FAA letter from the record before the Hearing Examiner. Ms. Riordan reiterated that some exhibits attached to the briefing and appeal statement of the Tateuchi appellants were inadvertently distributed to the Council. These will not be considered in the Council's deliberations because they were not part of the Hearing Examiner's record.

Ms. Riordan suggested that the Council address the motions by taking argument on the three issues. Appellants and respondents would each be given five minutes to present arguments on all three motions, for a total of 20 minutes. After arguments on the three motions are concluded, the Council will need to rule on the motions in sequential order.

Mayor Degginger stated that the Council will now hear arguments on the three motions beginning with the parties who have presented the motions, which is Kemper Development and the City's Development Services Department.

Keith Dearborn, attorney for Kemper Development, said he is reluctant to bring procedural matters before a legislative body, because he understands that elected officials typically want to get to the merits of a matter. Mr. Dearborn noted that the Council is asked to determine whether the Hearing Examiner made a mistake in applying the standards of the City Code. He questioned

how this determination can be made if the issues being presented to the Council were not presented to the Hearing Examiner, as is the case in both of the appeals.

Regarding timeliness, Mr. Dearborn said his office received an appeal statement from Mr. Su's attorney on Monday afternoon. The appeal deadline was April 3, and the applicant's deadline for submitting memorandums to the Council was a day and a half later. Mr. Dearborn likened this to filing a lawsuit, and then changing the lawsuit a couple of days before trial. This is not allowed in court, and it should not be allowed before the City Council.

Mr. Dearborn said Mr. Su did not state any appeal issues in his August 3 appeal. He said Mr. Su did not identify any findings or conclusions required by the City Code on which to base his appeal. Mr. Dearborn asked the Council to dismiss both Su appeals. For the Tateuchi appeal, Mr. Dearborn asked the Council to dismiss issues and submittals that were not presented to the Hearing Examiner. He noted that the FAA issue was not raised during that hearing. The only noise issue raised on the record by Ina Tateuchi's attorney was wind, but now other noise issues are being raised.

Catherine Drews, representing the Development Services Department, asked the Council to dismiss Mr. Su's supplemental appeal statement. She noted that Mr. Dearborn raised many of the issues that are also of concern to Development Services. The primary issues are untimeliness and the broadening of appeal issues. The Development Services Department was seeking a simple clarification in asking for Mr. Su's appeal statement. The Department and applicant are both faced with the same prejudice in receiving the list of appeal issues a day and a half before briefings were due. Ms. Drews asked the Council to dismiss the supplemental appeal statement in its entirety.

Responding to Deputy Mayor Balducci, Ms. Drews clarified that the Development Services Department brought forward the motion to dismiss the supplemental appeal statement. Development Services is not requesting dismissal of the original appeal submittal. Ms. Drews said Development Services also adopted by reference Kemper Development's arguments relating to the Tateuchi appeal and the issues that were not presented to the Hearing Examiner.

Bob Johns, attorney for John Su and Su Development, stated that Mr. Su filed his appeal without the benefit of an attorney. At that time, he did raise certain issues including compliance with the conditional use permit criteria, consistency with the Comprehensive Plan, the precedential impact of the heliport proposal, the need to update the City's regulations regarding heliport approval and ordinances relating to a heliport conditional use permit.

Mr. Johns acknowledged that Mr. Su did not, as the City's rules require, provide the City with a list of the findings and conclusions to which he objected. However, his appeal indicated that he would file that once the transcript of the hearing became available. Mr. Johns said Mr. Su then retained an attorney. The City objected to the attorney's participation because he had performed work for the City related to Sound Transit. Mr. Johns was hired a couple of weeks ago to represent Mr. Su.

Mr. Johns said he received a call from Ms. Drews a week before last Thursday asking him to file the supplemental statement listing the findings and conclusions that were being challenged. He responded within two days with a list of the findings, and with conclusions as to why they are consistent with the appeal issues cited above from the original appeal. Mr. Johns said the issues are not new; they were raised for the first time in Mr. Su's appeal filed before the appeal deadline. Mr. Johns asked that Mr. Su and Su Development be allowed to proceed to address the merits of the appeal.

Steven Recor, attorney for Mrs. Tateuchi and additional appellants listed on the notice to appeal filed in August 2009, said he agrees with Mr. Dearborn about the importance of fairness. He stated that citizens should not have to recite every rule and regulation applicable to the Hearing Examiner's review in order to have the right to appeal. Mr. Recor said the City's regulations were violated because the applicant did not provide a formal approval notice from the FAA in its permit application. He said a Hearing Examiner cannot violate, ignore, or fail to enforce the law, and not be held responsible later if found to have done so.

Mayor Degginger noted that the first issue before the Council is whether to grant the motion of Kemper Development to dismiss the Su Development appeal on the basis of untimeliness.

→ Deputy Mayor Balducci moved to deny the Motion to Dismiss the Su Development Appeal. Councilmember Bonincontri seconded the motion.

Deputy Mayor Balducci recalled that a statement of appeal was received in August, and is referenced in the Hearing Examiner's report and record. She noted additional blue-colored documents stamped as received on October 27. Her understanding is that the statement of appeal in the record was timely, and that it raises the issues which are the basis for the appeal. The statement might not present the issues in the format expected by the City. However, it raises the appeal issues in a way that she can understand, and the statement was timely. She is opposed to dismissing the appeal.

Responding to Councilmember Lee, Ms. Riordan clarified that the immediate issue before the Council is the motion by Kemper Development to dismiss the Su appeal based on claims of untimeliness. The Council motion is to deny this request to dismiss the Su appeal.

Councilmember Creighton opined that the October 27 submittal was untimely. However, Mr. Su's pro se letter of August 3 was timely and should therefore be included in the record.

Mayor Degginger concurred that the August 3 letter appears to be timely according to the rules. While the form of the submittal was not ideal, the appeal was filed by the appellant without legal counsel, and it does address some of the decision criteria. Mayor Degginger expressed support for the motion to deny the motion to dismiss the Su appeal.

→ The motion to deny Kemper Development's Motion to Dismiss the Su Development Appeal carried by a vote of 7-0.

- Deputy Mayor Balducci moved to grant the Motion to Dismiss the Su Supplemental Appeal Statement on the basis of untimeliness. Councilmember Creighton seconded motion.

Deputy Mayor Balducci said she wants to ensure that Mr. Su's appeal can be heard. However, the Supplemental Appeal Statement might be raising new issues, and it would not be fair to be presenting new issues as of October 27. She apologized to Mr. Johns that this statement was requested from the City. She feels the statement is not necessary in order to answer the substantive issues of the appeal. Ms. Balducci opined that the fair way to go is to dismiss the document, so as to not risk that there are issues embedded in it that the Council might miss.

Responding to Councilmember Chelminiak, Ms. Balducci said the intent of her motion is to disregard the October 27 submittal, hear oral arguments on the issues cited in the August 3 appeal, and ultimately rule on the merits of those arguments.

Councilmember Chelminiak questioned what will happen if the October statement is removed from consideration but issues from the statement are then presented in oral argument. Ms. Riordan said she will draw that to the Council's attention should it occur. The Council could then inquire of Mr. Johns as to whether he believes the specific issue was covered in the original appeal submittal.

Responding to Councilmember Davidson, Ms. Riordan confirmed that if the October appeal statement is disregarded, Mr. Su would be allowed and expected to argue issues from the August appeal submittal.

Mayor Degginger expressed support for the motion to dismiss the Su supplemental appeal statement based on its late submittal.

- The motion to grant the Motion to Dismiss the Su Supplemental Appeal Statement carried by a vote of 7-0.

Mayor Degginger stated that the third procedural request before the Council is the Motion to Dismiss portions of the Tateuchi appeal on the basis of a failure to raise the absence of the FAA letter from the record before the Hearing Examiner.

Responding to Deputy Mayor Balducci, Ms. Riordan stated her understanding of the argument raised by Kemper Development and the Development Services Department, which is that the appellant did not raise the issue before the Hearing Examiner about the absence of a FAA letter in the record, and therefore the issue cannot be considered by the City Council in its deliberations. In further response, Ms. Riordan confirmed that the legal standard of review for the Council is whether there is substantial evidence in the record to support the Hearing Examiner's findings.

- Deputy Mayor Balducci moved to deny the Motion to Dismiss portions of the Tateuchi appeal on the basis of waiver, and Councilmember Chelminiak seconded the motion.

Ms. Balducci stated her understanding of a waiver of an objection, in which an attorney passes up an opportunity to object to testimony during the course of a trial. However, this case appears to be more of a failure to object to the ruling that the conditional use permit should be granted subject to conditions, one of which is the FAA letter. Ms. Balducci opined that the purpose of the appeal is to provide the opportunity to say a finding was wrong. She said there was discussion in the hearing, which is reflected in the transcript, regarding the FAA letter. She does not see where the waiver comes in because it is not as if someone did something wrong in the hearing, it is an objection to the finding itself.

Councilmember Bonincontri expressed support for the motion. She noted that the condition as stated in the Hearing Examiner's report could be interpreted to mean that the permit is approved as long as the FAA letter is submitted, in which case the City would have to accept any mitigation required by the FAA. However, it could also be interpreted to mean that the City should have the FAA letter before the Council makes a ruling. Her observation is that the appellant is using the latter interpretation, which Ms. Bonincontri thinks is a valid argument to consider.

Responding to Councilmember Davidson, Ms. Riordan said there was not a finding by the Hearing Examiner regarding the presence or absence of the FAA letter. There was discussion of the FAA and its requirements. Condition of approval number 5 in the Hearing Examiner's report relates to the FAA.

Deputy Mayor Balducci stated a hypothetical situation in which a particular issue was never raised during staff's review or a Hearing Examiner's record, but it becomes apparent later that the oversight resulted in a violation of the City Code. She does not feel that the concept of waiver can be applied in these instances and essentially force the City to accept a violation of its own rules. Her understanding is that the appellant is alleging that a violation of the rules exists within the Hearing Examiner's decision, and she feels this assertion should not be ignored.

Mayor Degginger said he supports the motion to deny the Motion to Dismiss. He does not see anything in the City's rules that say one waives if an issue about something missing in the application is not addressed in the record. He does not see any authority cited in the briefing on the Motion to Dismiss that says this is an accepted issue of law with regard to a waiver.

→ The motion to deny the Motion to Dismiss portions of the Tateuchi appeal on the basis of waiver carried by a vote of 7-0.

Mayor Degginger stated that the Motion to Dismiss is denied. He asked staff to proceed with the Limited Public Hearing on the appeal.

Ms. Riordan described the process for the hearing. Staff will present a report describing the procedural history of the application. After the Council opens the hearing, the parties will have the opportunity to present oral argument based on the Hearing Examiner's record. Appellants will share 20 minutes total to present their arguments, and will proceed first. They may reserve a portion of their time to be used for rebuttal. The respondents will also have 20 minutes total to present their arguments. Upon conclusion of the respondents' testimony, the appellants will be

permitted to make rebuttal argument if they earlier chose to set aside the time.

The Council may ask questions of any party or of staff, or of any other person, about any matter contained within the record. However, new material not contained in the record made before the Hearing Examiner may not be presented. After all of the argument is presented, and after the Council has asked any questions it may have, the Council will have the opportunity to deliberate and render a decision either tonight or at a subsequent meeting.

Ms. Riordan explained that the appellants bear the burden of proof. The Council may grant the appeal or grant the appeal with modifications if the appellants have carried the burden of proof and the City Council finds that the decision of the Hearing Examiner is not supported by material and substantial evidence. In all other cases, the appeal shall be denied. The City Council shall accord substantial weight to the decision of the Hearing Examiner. In this context, evidence is material if there is a reasonable probability that the presence or absence of the evidence would alter the decision by the fact finder. Evidence is substantial where there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the decision.

Responding to Mayor Degginger, the appellants said they would like to reserve four minutes for rebuttal.

Carol Saari, Senior Land Use Planner, provided the staff report, which was the presentation previously provided to the Hearing Examiner. The proposal is to install a permanent private-use helistop on the roof of the existing Bellevue Place Bank of America building. The facility includes lighting, a second exit stair, and safety net. Ms. Saari noted an existing helistop constructed on the building in 1988. However, the landing was never activated as a permanent helistop.

The Hearing Examiner's conditions limit usage to five operations per week, and no operations are allowed on Sundays and legal holidays. The flight path is restricted to freeways and NE 8th Street. There will be no fueling at the site, and the applicant will upgrade the helipad to current FAA design standards and building code regulations.

Ms. Saari noted that the proposed helipad site is located in the Downtown Office-2 zoning district which along with the Downtown Office-1 zoning district is the most intensely developed area in the city. The application for this conditional use permit falls under Process 1 in which the Hearing Examiner reaches a decision, taking into consideration the recommendation of the Director of the Development Services Department. Tonight's Limited Public Appeal Hearing is in response to appeals of the Hearing Examiner's decision by Su Development and Tateuchi et al.

The Fire Department completed extensive review of the proposal, which included a practice drill for a fire event and the evacuation of a person. Both were fully executed without difficulty. The Fire Department's recommendations were imposed by the Hearing Examiner. These include requirements for fire hose stations, two portable foam extinguishers, an operations manual, and security systems. No fueling or smoking are allowed on the helistop.

Ms. Saari reviewed the project timeline, which began in Spring 2008 with discussions between the applicant and City staff. On October 16, 2008, the applicant held a pre-submittal helicopter test to measure noise impacts to the surrounding area. The applicant submitted an application on November 12, 2008. The City held the required public hearing on February 18, 2009, at which time residents expressed concern about noise impacts. A second helicopter noise test was conducted on May 2, 2009. The City held a second public hearing on May 5, 2009. The matter was presented to the Hearing Examiner in June, and the Hearing Examiner issued a decision of approval, with conditions, on July 20, 2009. On August 3, the City received the two appeals.

Ms. Saari referred the Council to the extensive list of conditions in the Hearing Examiner's report. These address a number of issues including days and hours of operation, flight path, securing a FAA "no objection" letter before activation, requirement for a communication line and web site for residents, fire safety measures, and the provision of a Standard Operating Procedures manual.

- Deputy Mayor Balducci moved to open the Limited Public Hearing on the Helistop Appeal, and Councilmember Chelminiak seconded the motion.
- The motion to open the Limited Public Hearing carried by a vote of 7-0.

Bob Johns spoke on behalf of John Su and Su Development. He clarified that the appeal is not asking the Council to deny the permit, but it is asking the Council to remand the matter to staff to complete the application and to provide the Council and the public with the opportunity to review the FAA information. The appeal also asks the City to conduct a study to resolve what appears to be inconsistencies in the City's regulations and plans relating to heliport impacts.

Mr. Johns expressed concern about several aspects of the conditional use permit criteria. One of the requirements is for consistency with adopted codes. Mr. Johns said the Hearing Examiner focused on one section of the noise code that exempts airplanes in flight. Noise readings are required for other conditions, primarily having to do with helicopter takeoffs and landings. The Hearing Examiner concluded that the noise study reflected compliance with the code.

Mr. Johns expressed concern that there is no evidence in the record to demonstrate that the readings were taken in compliance with the Noise Code, which requires that the tests occur at the property boundary of the receiving site. The second issue is that there are two inconsistent sets of noise rules that apply in this situation. One is the very high decibel readings that the Hearing Examiner focused on. However, Mr. Su's appeal references standards for noise at and in residential structures. Noise levels in residential structures cannot exceed 45 decibels inside the living area, and 40 decibels inside the residential sleeping area.

Mr. Johns said that the Hearing Examiner's findings show noise readings as high as 62 decibels inside the buildings. He urged the Council to send the matter back to staff for a recommendation on how to resolve the conflict between these noise regulations.

Mr. Johns said there are also inconsistencies in the code with regard to how the project relates to other development in the area. He noted code restrictions on flying over residential areas. He

explained that the flight path is wider at NE 8th Street and I-405 than it is at the heliport site.

Mr. Johns explained that Su Development's biggest concern relates to the City's efforts for more than 20 years to write an aggressive set of Comprehensive Plan policies and guidelines designed to encourage high-density residential and commercial activity in the downtown core. He said the permit application and the noise impacts of the heliport facility are inconsistent with the Comprehensive Plan. Mr. Johns summarized the appellant's request that the City remand the matter to staff to obtain a completed application, conduct an accurate noise study, and evaluate the consistency of the heliport proposal with Comprehensive Plan policies.

John Su noted that Su Development has never appealed any project in Bellevue or Seattle since it began its business in 1981. However, he expressed concerns regarding the potential impacts of heliports on the quality of life in Bellevue. Mr. Su said the Kemper heliport project conflicts with City Codes, as explained by Mr. Johns. Mr. Su questioned the urgency of the heliport application. He noted that Kemper Development built the heliport 20 years ago and has not stated an immediate need for its operation. An additional issue of concern is the costs and benefits of individual convenience versus the quality of the living environment for the broader community. Mr. Su asked the Council to study the issue of private helicopter facilities further before granting a permit. He noted that Seattle, Vancouver, Portland and San Francisco do not allow helicopter landings in residential areas or the business core, but only in industrial zoned areas.

Ina Tateuchi said that she and her husband live on the 20th floor of a residential building in downtown Bellevue. She is now worried about living in their home, and they would not have bought their condo had they known of the nearby heliport landing. She does not want to have to talk over or sleep through a noise that is the equivalent of a vacuum cleaner in their living room.

Steve Recor expressed concern about the project's compliance with Land Use Code Section 20.20.450, which states that all applications for a heliport must include the results of the appropriate FAA review. He said that the City staff report and the Hearing Examiner both concluded that if the FAA issued a notice of approval, it would solve every issue listed in the City Code relating to the safety of a helicopter. Mr. Recor said City staff and the Hearing Examiner acknowledged that code provisions had not been complied with. He said the permit application was not presented to the Hearing Examiner by staff.

Ms. Riordan interrupted and stated that the application cannot be reviewed by the Council if it was not included in the record before the Hearing Examiner.

Continuing, Mr. Recor said he reviewed a copy of the notice issued by the FAA.

Ms. Riordan and Mayor Degginger instructed Mr. Recor that the document cannot be discussed because it is not part of the Hearing Examiner's record.

Mr. Recor said he understands that he cannot submit new evidence. However, he is concerned that the notice of FAA regulations was not put into the record. He opined that had the FAA notice been put into the record, it would have revealed information as to the scope of the FAA

review. Mr. Recor said that in the notice of application document, Mr. Ketchum states nothing about the flight path that was mandated by the City. The City had already told Kemper Development that the helicopter must fly directly over NE 8th Street. Mr. Recor said that the narrow flight path was not revealed to the FAA. He explained that he wanted to include in his brief references to documents that had been provided or would have been provided to the City by the FAA had the condition requiring a FAA approval notice been enforced. One of the documents is a FAA advisory circular, which the City Attorney has indicated cannot be mentioned. However, a City staff planning document in the record refers on page 10 to FAA advisory circular 150-5390-2B, and then quotes from the advisory circular.

Responding to Mayor Degginger, Mr. Recor said he is referring to Exhibit 1, page 10, which mentions the FAA advisory circular.

Mr. Recor requested that the Council remand the matter to the Hearing Examiner to add the FAA approval notice to the record. He said the Hearing Examiner did not follow his obligation under the regulations to address and include the FAA notice. Mr. Recor said he does not think that City staff or the Hearing Examiner intentionally excluded the document. He thinks that they assumed the FAA was reviewing all of the issues. However, Mr. Recor said the FAA does not look at every single issue in terms of the City Code, but instead looks at the navigable air space which is 500 feet above ground. Mr. Recor said the FAA did not review the flight path and other issues. He again asked the Council to remand the matter to the Hearing Examiner to allow consideration and discussion of the FAA notice and issues.

Keith Dearborn said he will first address the FAA issue, and then the noise issue. He said he and the applicant are not prepared to respond to the arguments presented by Mr. Su's attorney tonight, as the arguments were not disclosed in the appeal statement. The issues were noted in the brief received at 1:00 p.m. on Wednesday, but Mr. Dearborn and the applicant did not respond to them in their brief. Mr. Dearborn asked that the applicant be allowed to respond to the arguments in writing, if the Council will be considering the issues raised tonight relating to the Su Development appeal.

Mr. Dearborn said he will respond to the issues raised in the Tateuchi appeal. He stated the argument of the appellant, which is that had the FAA review been completed before the Hearing Examiner's decision, the public would have been allowed to address the review before the Hearing Examiner. Mr. Dearborn said the FAA does not have a role in approving a helistop. The FAA reviews the proposal for compliance with federal requirements, including safety, and files either a letter of objection or no objection. If the FAA files a letter of objection, it identifies the actions to be taken to remedy the objections.

Mr. Dearborn noted that City Code states that all applications to construct should include the results of the FAA review. This was first applied in Bellevue to the Overlake Hospital helistop. In both cases, the Hearing Examiner imposed the same condition that FAA review must be completed before activation of the helistop facility. And if there are FAA objections, the proposals must be modified before operations are activated. Mr. Dearborn emphasized that the same approach and standard was followed by the Hearing Examiner in both cases. The Hearing Examiner heard no arguments or evidence and issued no findings regarding the FAA's review.

Mr. Dearborn said there is nothing in the record regarding the FAA review of this application, other than the testimony of Mr. Ketchum, who is an experienced siter of helistop facilities. His resume is in the record. Mr. Ketchum said in the record that he is confident the FAA would approve the project because he would not have gotten Kemper Development to go to all of the expense of preparing an application and performing noise studies if he was not confident that it met FAA standards. Mr. Dearborn said this is all that is in the record regarding the FAA.

Continuing, Mr. Dearborn reiterated that the Hearing Examiner imposed the same condition it imposed for the Overlake helistop, which was that the project must ultimately meet FAA requirements. Nothing was presented in the record as to whether the FAA completed a review or issued objections. He explained that the record includes discussion about planes. The code mentions transitional surface, primary surface, and helipad as cited from FAA regulations. Mr. Dearborn said these references are being confused with flight path. He said the code addresses transitional and other surface requirements in one section, and how the flight path is to be established as a separate issue. The City regulates the flight path, which was established along NE 8th Street. Mr. Dearborn said these two different requirements are not inconsistent and have been met.

Regarding safety, Mr. Dearborn referred to the testimony of the co-pilot in the second noise test. The pilot is a professional with many years of experience as well as a resident of Lincoln Tower. His wife is the president of the Lincoln Tower Homeowners Association. Mr. Dearborn said the pilot testified before the Hearing Examiner that he had no reservations about the safety of the heliport facility, and he did not expect it in any way to not comply with FAA requirements.

Mr. Dearborn said that Mr. Recor did not address FAA requirements before the Hearing Examiner, and he did not request the opportunity to have his expert review the requirements.

With regard to noise, Mr. Dearborn said a resident of Lincoln Tower hired an independent noise expert to conduct a study. This noise expert raised no issues with regard to compliance with the City's noise code. All testimony before the Hearing Examiner was that the heliport proposal complied with the noise code. Mr. Dearborn said City staff observed both noise tests from multiple locations and recorded their own scores for different factors on worksheets. The worksheets contain a majority of scores of 1, which is defined as no effect in terms of noise impacts.

Mr. Dearborn said the downtown heliport location is already a noisy place. Residents living there are routinely hearing noises that are as loud or louder than what they will hear from the helicopters. Based on the conditions imposed regarding restrictions on operations, residents will be exposed to this noise for a maximum of 30 minutes within a given week.

Responding to Mayor Degginger, the City Clerk indicated approximately seven minutes remaining for the respondents' arguments.

→ Deputy Mayor Balducci moved to extend the meeting to 10:30 p.m., and Councilmember Chelminiak seconded the motion.

→ The motion to extend the meeting carried by a vote of 7-0.

Catherine Drews, Legal Planner, identified three issues with regard to the Kemper Development Company heliport application. These include the inappropriateness of using project review to engage in land use planning, and the appropriateness of the conditional use permit process to address potential project impacts. The third issue is that the record contains substantial and material evidence in support of the Hearing Examiner's decision to approve the permit with conditions.

Ms. Drews said Su Development is asking the Council to postpone a decision on the permit application for a period of six months, in part to conduct a study to determine whether the Comprehensive Plan and development regulations are consistent and uniform for heliports. This request is contrary to state mandates regarding the processing of permit applications. The state Growth Management Act and Local Project Review Act mandate that project review shall be used to make individual project decisions and not to make land use planning decisions. The Comprehensive Plan and development regulations are the foundation for project review, which is focused on determining a project's compliance with existing regulations. Project review cannot involve a reconsideration of Comprehensive Plan policies and land use regulations.

Ms. Drews said the Hearing Examiner properly concluded that the conditional use permit (CUP) application complies with the existing decision criteria. The conditional use process permits staff to consider unique site characteristics and neighborhood context when reviewing applications. Conditional uses may have special characteristics that warrant additional analysis and the imposition of conditions to address those characteristics. In this case, the Hearing Examiner correctly found that the heliport would not be materially detrimental to the uses and properties within the immediate vicinity of the facility, because the conditions placed on the project would mitigate the potentially detrimental impacts of the heliport. Ms. Drews referred the Council to page 11 of the Hearing Examiner record for this condition.

Ms. Drews said the conditions imposed by the Hearing Examiner include limiting the frequency of the operations, conditioning a flight path, limiting the type of helicopter to light turbines, limiting the engine time on the heliport, imposing Fire Department safety requirements, mandating a reporting requirement and public comment process that includes a web site for lodging complaints, requiring pilots to adhere to the fly neighborly guide, limiting the operation of lights at the heliport, and requiring operations to cease and the applicant to prepare a modification plan if the development has the potential to obstruct the flight path or landing pad. A comprehensive list of the conditions is provided in the Hearing Examiner's report at page 16-20. As Mr. Dearborn discussed, Ms. Drews said the Hearing Examiner correctly found that the noise impacts meet the requirements of the City's noise code.

Ms. Drews said that the Hearing Examiner's decision is supported by material and substantial evidence. The Council accords substantial deference to the Hearing Examiner's decision, which is supported by significant and material facts that were raised and considered with regard to the issue of whether the heliport would be materially detrimental and whether it complies with the CUP decision criteria. The Development Services Department agrees with the Hearing Examiner's conclusion that the application meets these criteria.

Ms. Drews explained that in order to deny the CUP application and grant the appeals, the Council must find that the Hearing Examiner's decision is not supported by material and substantial evidence. However, the record contains both. Ms. Drews referred to the applicant's comments regarding the noise tests that were conducted on two different occasions. The test results were discussed in detail during public hearings. The public hearing before the Hearing Examiner occurred over two evenings with substantial evidence and testimony, including the presentation of 28 exhibits and testimony from 15 citizens.

Noting that the Hearing Examiner's decision is supported by the evidence, Ms. Drews asked the Council to deny the appeals.

Mayor Degginger invited Mr. Johns to present his rebuttal within his remaining time allotment.

Mr. Johns said that the applicant is required to prove that its proposal is compatible with existing development in the vicinity of the helistop, that it will not be materially detrimental to other development, that it meets City Code requirements, and that it is consistent with the Comprehensive Plan. He opined that the Council is not able to consider whether the project complies with noise standards, rules regarding flying over residential areas, and whether the flight path is correct. Mr. Johns said the only solution for the Council is to remand the matter to the Hearing Examiner to take additional evidence involving the FAA report, a proper noise study, and other issues raised by the appellants.

Mr. Recor asserted that the Hearing Examiner and City staff relied on the assumption that the FAA had addressed all of the issues related to flight safety. He said the approval notice issued by the FAA does not address these issues. He further stated that nothing was revealed to the FAA with regard to the limit on where the helicopter could fly. Mr. Recor said there is no way to address these most important issues without remanding the matter to the Hearing Examiner and entering the FAA document into the record. He said the application does not comply with adopted code requirements.

→ Deputy Mayor Balducci moved to close the limited public hearing, and Councilmember Chelminiak second the motion.

→ The motion to close the limited public hearing carried by a vote of 7-0.

Councilmember Chelminiak noted the request from Kemper Development to provide additional written briefing, and questioned whether this would be allowed.

Ms. Riordan advised that the Council is allowed to reopen the limited public hearing and request clarification from Mr. Dearborn.

→ Deputy Mayor Balducci moved to reopen the limited public hearing, and Councilmember Chelminiak seconded the motion.

→ The motion to reopen the limited public hearing carried by a vote of 7-0.

Responding to Mayor Degginger, Mr. Dearborn said the issues to which he would like to respond include arguments in Mr. Johns' brief and in his testimony tonight. Mr. Dearborn said the brief raises issues that were not in the appeal statement. However, he is not prepared tonight to cite and respond to the arguments. With regard to oral arguments presented tonight, Mr. Dearborn said that Mr. Johns argued that airplanes are exempt, which Mr. Dearborn assumes is picking up the argument that helicopters are not exempt. Mr. Dearborn said that he and his client addressed this in the Tateuchi response. It was not raised by Mr. Su in his original appeal statement. Responding to Mayor Degginger, Mr. Dearborn said it would be adequate if the Council could refer to the applicant's response to the Tateuchi appeal in this regard.

Mr. Dearborn said that Mr. Johns makes an argument that the project is inconsistent with adopted codes, one example being the noise standards. Mr. Dearborn said there is nothing in Mr. Su's appeal statement regarding noise issues. Mr. Dearborn said the appellant states that there are no records to show that the noise study complied with the code, by which Mr. Dearborn assumes that Mr. Johns means the mechanics of the study.

Mr. Dearborn said Mr. Johns talked about flight path and the types of surfaces. He said that Mr. Johns claims that the flight path goes over residences, and that this is a matter of concern. Mr. Dearborn said this issue was not raised in the August 3 appeal statement. Mr. Dearborn noted that he does not understand Mr. Johns' issue, and it was not raised in the Tateuchi appeal.

Responding to Deputy Mayor Balducci, Mr. Dearborn clarified that his comments are in reference to Mr. Johns' brief. Mr. Dearborn stated the brief does not correspond with issues raised in the August statement of appeal. Of the arguments raised in Mr. Johns' brief, Mr. Dearborn said that the only one he understood to be also from the August statement was the argument that the downtown has a commitment to high density residential, and that the project is inconsistent with that direction. Mr. Dearborn said that other than what he has just stated, he does not believe that any of Mr. Johns' oral arguments were presented in the August appeal statement. If those arguments are to be allowed, Mr. Dearborn and the applicant would like the opportunity to respond in writing.

Responding to Mayor Degginger, Mr. Dearborn acknowledged that the August appeal statement made a general comment that the helistop application was inconsistent with Comprehensive Plan policies. However nothing specific was stated in that regard, and there is no identification of specific findings or conclusions of the Hearing Examiner related to the Comprehensive Plan to which they take exception. Mr. Dearborn said it was not until he filed his brief, that he then saw Mr. Johns' brief and was able to see his arguments with regard to the Comprehensive Plan. Mr. Dearborn said that up to that point, he had no knowledge of the appellants' arguments regarding the Comprehensive Plan.

Deputy Mayor Balducci suggested, given that Mr. Johns' brief has been distributed to the Council, allowing the opportunity for Mr. Dearborn to respond to the Su Development memorandum to the City Council.

Mayor Degginger commented that in looking at the August 3 appeal statement and the brief, it appears there is discussion of several issues that are not raised in the initial appeal statement, including the noise and flight path issues. He noted the options of allowing Mr. Dearborn to submit a supplemental brief in response to the Su Development brief, or striking those portions of the brief that fall outside of the record. Mr. Degginger feels it makes more sense to allow a response, given that Councilmembers have already read the information.

Councilmember Chelminiak agreed with the Deputy Mayor's suggestion to move forward. He feels that the noise issue is potentially covered under the Su Development August 3 appeal statement, in the reference to code inconsistencies that could be materially detrimental.

Mayor Degginger declared a five-minute recess. The meeting reconvened at 10:22 p.m.

Deputy Mayor Balducci reiterated her support for allowing the applicant to submit an additional brief.

- Deputy Mayor Balducci moved to allow Kemper Development to submit a responsive brief to the Su Development appeals brief. It shall be submitted within one week and may not exceed five pages. Mayor Degginger seconded the motion.
- The motion to allow Kemper Development to submit a supplemental brief carried by a vote of 7-0.
- Deputy Mayor Balducci moved to close the limited public hearing, and Councilmember Chelminiak second the motion.
- The motion to close the limited public hearing carried by a vote of 7-0.

Mayor Degginger suggested placing continued discussion of the appeal on the agenda for the November 16 meeting.

Deputy Mayor Balducci stated that the Council has received a great deal of information tonight which she would like some time to review and digest, along with the pending brief from Mr. Dearborn.

10. Land Use: None.
11. Other Ordinances, Resolutions and Motions: None.
12. Unfinished Business: None.
13. Continued Oral Communications: None.
14. New Business: None.
15. Executive Session: None.

16. Adjournment

At 10:24 p.m., Mayor Degginger declared the meeting adjourned.

Myrna L. Basich
City Clerk

/kaw